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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. TERRELL FRAZIER et al., Defendants and Appellants.	B227717 (Los Angeles County Super. Ct. Nos. BA282901 & BA322783)

APPEALS from judgments of the Superior Court of Los Angeles County, Charles Horan, Judge. Affirmed as modified.

Joseph Shipp, under appointment by the Court of Appeal, for Defendant and Appellant Terrell Frazier.

Edward J. Haggerty, under appointment by the Court of Appeal, for Defendant and Appellant Raul Alvarez.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Lance E. Winters, Assistant Attorneys General, James William Bilderback II and Steven E. Mercer, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendants, Terrell Frazier and Raul Alvarez, were convicted by a jury of: first degree murder committed during a robbery (Pen. Code,[1] §§ 187, subd. (a), 190.2, subd. (a)(17)); second degree robbery (§ 211); and grand theft from a person (§ 487, subd. (c)). The jury found Mr. Frazier discharged a firearm proximately causing the murder victim's death. (§ 12022.53, subds. (d), (e)(1).) The jury also found the crimes were committed for the benefit of a criminal street gang. (§ 186.22.) Additionally, Mr. Frazier was convicted of two counts of second degree robbery (§ 211). The jury found Mr. Frazier personally used a firearm in the commission of one of those robberies. (§ 12022.53, subd. (b).) Mr. Alvarez was sentenced to an indeterminate term of life without the possibility of parole plus 50 years to life consecutive to a determinate 3-year term. Mr. Frazier was sentenced to an indeterminate term of life without the possibility of parole plus 50 years to life consecutive to a determinate term of 19 years, 4 months. We modify the judgments and affirm as modified.

II. THE EVIDENCE

A. The Prosecution Case

1. The August 6, 2004 grand theft person

Defendants were members of a Los Angeles gang. On August 6, 2004, at an Arco gas station, Mr. Frazier forcibly took $20 and a cellular telephone from Tina Caldwell. Mr. Frazier left the scene in a black Dodge Intrepid driven by Mr. Alvarez. Ms. Caldwell chased defendants in her car and recorded the Intrepid's license plate number. During the chase, Mr. Alvarez stopped the car, got out and threw Ms. Caldwell's cellular telephone

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1 Future statutory references are to the Penal Code unless otherwise noted.

on a lawn. Mr. Alvarez denied knowing Mr. Frazier was going to take her telephone. Ms. Caldwell got a good look at defendants' faces. She identified both defendants in pretrial photographic lineups, at the preliminary hearing and at trial.

2. The September 3, 2004 robbery homicide

On September 3, 2004, defendants committed a robbery homicide at a video game store. An accomplice, Christopher Bingley, testified against them in return for leniency. Defendants telephoned Mr. Bingley and said they were going to commit a robbery. Defendants drove to Mr. Bingley's house to pick him up. Mr. Alvarez was driving a black Dodge Intrepid. Mr. Frazier was in the front passenger seat. Mr. Frazier explained that they were going to rob a video game store. Mr. Bingley was directed to duct-tape the employees. Mr. Frazier entered the store first and held two employees—Milton Secord and a second man—at gunpoint. Mr. Alvarez and Mr. Bingley followed quickly behind. Mr. Bingley and Mr. Alvarez duct-taped the employees while Mr. Frazier pointed the gun at them. A customer, James Bishara, entered the store while the robbery was in progress. Following a verbal altercation and what sounded to Mr. Bingley like wrestling, Mr. Frazier fatally shot Mr. Bishara. Mr. Bingley saw Mr. Bishara on the ground. Mr. Frazier was standing nearby holding the gun in his hand. The robbers took: video games; money from the store's cash register; the cash in the employees' wallets; and Mr. Secord's cellular telephone.

On September 6, 2004, police officers stopped a black Dodge Intrepid driven by Mr. Alvarez. Mr. Frazier exited the passenger seat, reached toward his waistband and ran. A police officer chased and arrested Mr. Frazier. Mr. Secord identified Mr. Frazier in an initial photographic lineup. Mr. Secord noted there was a "strong possibility" Mr. Frazier participated in the robbery. During a live lineup, on April 21, 2005, Mr. Secord was 95 percent certain Mr. Frazier was carrying a gun during the robbery. The gun was pointed at Mr. Secord during the robbery. Mr. Secord further identified Mr. Frazier at the preliminary hearing and at trial.

The murder weapon was a .380 caliber semi-automatic pistol. One month after the murder, on October 6, 2004, the gun was found in a backpack belonging to a female member of defendants' gang. Police officers found .38 caliber ammunition during a search of Mr. Frazier's girlfriend's house.

3. The November 18, 2004 robbery

On November 18, 2004, Mr. Frazier and a second man robbed Anthony Coleman at gunpoint. Mr. Frazier came face-to-face with Mr. Coleman. Mr. Frazier pushed the gun into Mr. Coleman's stomach. Mr. Frazier told Mr. Coleman: "This isn't a game. I'll kill you right here." Mr. Coleman's cellular telephone was stolen by Mr. Frazier. Mr. Coleman subsequently identified Mr. Frazier in a book of photographs, at the preliminary hearing and at trial. Mr. Coleman was 100 percent sure Mr. Frazier was the robber.

4. The November 21, 2004 robbery

Mr. Frazier committed an additional robbery on November 21, 2004. This robbery occurred at the same intersection where Mr. Coleman was robbed. Mr. Frazier and an unidentified co-perpetrator robbed Tyler Severe. Mr. Severe's cellular telephone and wallet were stolen. The co-perpetrator was armed. Mr. Severe did not see a gun, but he felt a hard metal object. The unidentified assailant said, "Give me your phone or . . . [I'll] shoot[you]." Mr. Frazier was yelling, "Give me the phone or we're going to shoot you." Mr. Severe saw Mr. Frazier's face clearly when they were at arms' length. Mr. Severe identified Mr. Frazier in a photographic lineup, at the preliminary hearing and at trial. Mr. Severe was 100 percent sure Mr. Frazier was one of the individuals involved in the robbery.

B. Defense Evidence

1. LeMarcus Funchess

Detective Robert Lait and a partner interviewed Mr. Funchess in March 2005. As noted, Mr. Bingley was granted leniency because he testified for the prosecution. Mr. Funchess told the detectives about a meeting with Mr. Bingley. Mr. Bingley said he had robbed the video game store. According to Mr. Funchess, Mr. Bingley committed the video store robbery with two accomplices. Mr. Bingley also referred to a robbery in which Mr. Frazier was a co-perpetrator. Detective Lait said it was unclear from Mr. Funchess's statements whether Mr. Bingley had identified Mr. Frazier as a participant in the video game store robbery.

Mr. Funchess testified that on the day following the video game store robbery, Mr. Bingley bragged about committing the robbery homicide. Mr. Bingley said he had two accomplices, fellow gang members. Mr. Funchess did not know one of the gang member's real name. Mr. Funchess had never heard anyone call Mr. Frazier by one of the aliases referred to by Mr. Bingley. One of the persons named by Mr. Bingley was Eric Alexander. Mr. Alexander was a tall, kind of slender, medium-complexioned Black man who walked with a limp.

On cross-examination, Mr. Funchess described other aspects of the conversation with Mr. Bingley. Mr. Bingley spoke about other robberies he had committed as well. Mr. Bingley admitted committing a robbery with a gang member and getting some money out of it. Mr. Bingley described the other robber using a gang moniker. Mr. Funchess did not know Mr. Frazier by the gang moniker. But other people referred to Mr. Frazier by the gang moniker described by Mr. Funchess. Mr. Funchess recalled telling Detective Lait that Mr. Frazier "hung out" with Mr. Alvarez.

2. Lakesha Harmon

Ms. Harmon lived near the video game store. Ms. Harmon testified she did not recall ever talking to Detective Lait about the robbery. Detective Lait testified, however, he interviewed Ms. Harmon on January 14, 2005. According to Detective Lait, Ms. Harmon said Jade Harris had come to her apartment near the video game store. Mr. Harris said he planned to rob it. Mr. Harris asked Ms. Harmon for bags, rope and gloves. Mr. Harris returned a few days later. Ms. Harmon asked Mr. Harris whether he had robbed the video game store. Mr. Harris said he had not robbed the video game store. Detective Lait testified Mr. Harris was a member of defendants' gang.

3. Mr. Harris

Investigators Stewart Johnson and John Musakas interviewed Mr. Harris several days prior to trial. Mr. Harris told the investigators that he had "cased" the video game store. Mr. Harris did so with another person—neither of defendants here. Mr. Harris mentioned that he had duct tape with him at the time. Mr. Harris testified at trial and denied he had been at Ms. Harmon's house. Mr. Harris denied telling the investigators he had "cased" the video store. Mr. Harris said that when they asked him about it, he laughed at them.

4. Dr. Robert Shomer

Dr. Shomer testified about factors critical to an accurate eyewitness identification—stress, passage of time, repetition and confidence. In particular, Dr. Shomer stated that a witness's confidence has no relationship to the accuracy of his or her identification.

5. Mr. Alvarez's brother

Mr. Alvarez's brother was present when police officers searched their home. The officers removed video games. One of the removed games was a duplicate of another. The two copies belonged to Mr. Alvarez's brother. A friend made a duplicate of the game for Mr. Alvarez's brother. This occurred after Mr. Alvarez's brother's original video game became so scratched it could not be played anymore.

III. DISCUSSION[2]

A. Pretrial Motions

1. Count 5 dismissal motion

Defendants argue it was error to deny their motion to dismiss count 5, grand theft person, on grounds a gas station surveillance tape of the incident involving Ms. Caldwell had been destroyed while in police custody. In August 2004, Officer Tanya Eppenger investigated the grand theft from Ms. Caldwell at the Arco gas station. Officer Eppenger testified she viewed a surveillance tape. It contained only squares and lines. She was unable to make out any people or vehicles. Officer Eppenger testified she could not: even tell whether there were any people on the videotape; make out whether any vehicles were present; or see any date or time. If there had been anything at all worth noting, she would have done so. Detective Eppenger testified it was just a bad tape. The tape was old and had been reused several times. Officer Eppenger noted in a detective's case log, "I attempted to review the videotape from the market, but it is not clear enough or still enough to identify any possible suspect or vehicles." Deputy District Attorney Mark L. Inaba made an offer of proof that: the surveillance tape was booked into evidence; but

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2 Each defendant joins in arguments raised by the other.

the case was not filed; and the evidence was destroyed in the normal course of business. The trial court denied defendants' motion to dismiss count 5.

Our Supreme Court has explained the duty to preserve evidence: "Law enforcement agencies have a duty, under the due process clause of the Fourteenth Amendment, to preserve evidence 'that might be expected to play a significant role in the suspect's defense.' (*California v. Trombetta* (1984) 467 U.S. 479, 488; accord, *People v. Beeler* (1995) 9 Cal.4th 953, 976.) To fall within the scope of this duty, the evidence 'must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.' (*California v. Trombetta, supra,* 467 U.S. at p. 489; *People v. Beeler, supra,* 9 Cal.4th at p. 976). The state's responsibility is further limited when the defendant's challenge is to 'the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant.' (*Arizona v. Youngblood* (1988) 488 U.S. 51, 57.) In such case, 'unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.' (*Id.* at p. 58; accord, *People v. Beeler, supra,* 9 Cal.4th at p. 976.) [¶] On review, we must determine whether, viewing the evidence in the light most favorable to the superior court's finding, there was substantial evidence to support its ruling. (*People v. Griffin* (1988) 46 Cal.3d 1011, 1022.)" (*People v. Roybal* (1998) 19 Cal.4th 481, 509-510; accord, *People v. DePriest* (2007) 42 Cal.4th 1, 41-42.) The defendant has the burden of establishing the threshold requirement that the evidence had exculpatory value. (*People v. Alexander* (2010) 49 Cal.4th 846, 878; *People v. DePriest, supra,* 42 Cal.4th at pp. 41-42.)

Substantial evidence supports the trial court's ruling. The undisputed evidence was that the surveillance tape had no exculpatory value whatsoever. The trial court found Officer Eppenger's testimony was very clear and credible. There was no evidence the tape had any exculpatory value that was apparent before it was destroyed. Neither defendant has shown the surveillance tape could have played a significant role in his

defense. (See *People v. Hines* (1997) 15 Cal.4th 997, 1042 [erased portion of videotape].) Even if defendants could show the surveillance tape was potentially useful evidence that could have been subjected to testing that might have helped the defense, there was no evidence of bad faith by the police. (*Arizona v. Youngblood, supra,* 488 U.S. at p. 57; *People v. DePriest, supra,* 42 Cal.4th at p. 42; *People v. Farnam* (2002) 28 Cal.4th 107, 166-167.) Defendants have not shown any detective believed the surveillance tape had exculpatory value or it was destroyed to deny them an opportunity to defend against the charges.

We need not separately discuss the federal constitutional gloss defendants assert for the first time on appeal. Our Supreme Court has held, "'No separate constitutional discussion is required, or provided, when rejection of a claim on the merits necessarily leads to rejection of any constitutional theory or "gloss" raised for the first time [on appeal].' (*People v. Loker* (2008) 44 Cal.4th 691, 704, fn. 7.)" (*People v. Lynch* (2010) 50 Cal.4th 693, 735, fn. 14, disapproved on a different point in *People v. McKinnon* (2011) 52 Cal.4th 610, 636-643.) Further, Ms. Caldwell, the victim, gave an eyewitness account of the crime, positively identified defendants and recorded Mr. Alvarez's license plate number.

2. Severance and consolidation: counts 1 through 5

Mr. Frazier unsuccessfully moved pretrial to sever counts 1 and 2, the video game store robbery and murder, from counts 3 and 4, the robberies of Mr. Coleman and Mr. Severe. Mr. Frazier also opposed consolidation of count 5, the grand theft of Ms. Caldwell. He argues the trial court erred in so ruling. Mr. Alvarez did not join in Mr. Frazier's motion in the trial court. As a result, Mr. Alvarez forfeited any argument he was prejudiced by the denial of Mr. Frazier's motion. (*People v. Wilson* (2008) 44 Cal.4th 758, 793; *People v. Sanders* (1995) 11 Cal.4th 475, 507; see *People v. Lewis* (2008) 43 Cal.4th 415, 481.)

Joinder or consolidation of charges is preferred because it promotes efficiency. (*People v. Hartsch* (2010) 49 Cal.4th 472, 493; *Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1220.) We review the trial court's ruling under section 954 for an abuse of discretion. (*People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 281; *People v. Lynch, supra,* 50 Cal.4th at p. 735.) But, as our Supreme Court has held, "[E]ven if a trial court's ruling on a motion to sever [was] correct at the time it was made, a reviewing court must still determine whether, in the end, the joinder of counts resulted in gross unfairness depriving the defendant of due process of law. (*People v. Rogers* (2006) 39 Cal.4th 826, 851.)" (*People v. Gonzales and Soliz, supra,* 52 Cal.4th at p. 281.) The party seeking severance has the burden to clearly establish a substantial danger of prejudice requiring the charges to be separately tried. (*People v. Gonzales and Soliz, supra,* 52 Cal.4th at pp. 281-282; *People v. Catlin* (2001) 26 Cal.4th 81, 110.) In *Gonzales,* our Supreme Court explained: "Refusal to sever may be an abuse of discretion where[:] (1) evidence of the crimes to be jointly tried would not be cross-admissible in separate trials; (2) certain of the charges are unusually likely to inflame the jury against the defendant; (3) a 'weak' case has been joined with a 'strong' case or with another 'weak' case, so that the 'spillover' effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges; and (4) any one of the charges carries the death penalty or joinder of them turns the matter into a capital case. [(*People v. Catlin, supra,* 26 Cal.4th at p. 110.)] If evidence on each of the joined crimes would have been admissible in a separate trial of the other crimes, then such cross-admissibility ordinarily dispels any inference of prejudice. (*Ibid.*)" (*People v. Gonzales and Soliz, supra,* 52 Cal.4th at p. 282; accord, *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1120.)

No abuse of discretion occurred. The offenses were of the same class—wrongful taking of another's property—with one resulting in murder; therefore joinder was permissible. (*People v. Gonzales and Soliz, supra,*52 Cal.4th at p. 281; *People v. Koontz* (2002) 27 Cal.4th 1041, 1074-1075; see *People v. Grant* (2003) 113 Cal.App.4th 579, 586.) The crimes all occurred in gang territory. They were committed close in time, in the fall of 2004. (See *People v. Lynch, supra,* 50 Cal.4th at pp. 735-736; *People v.*

Zambrano (2007) 41 Cal.4th 1082, 1128-1129, disapproved on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; *People v. Gray* (2005) 37 Cal.4th 168, 221.) Evidence of the several crimes was arguably cross-admissible in that they occurred in the same neighborhood, close in time, and the perpetrators took cash and cellular telephones. (See *People v. Perez* (1967) 65 Cal.2d 615, 618-619; *People v. Renchie* (1963) 217 Cal.App.2d 560, 562-563.) There were no charges that were unusually likely to inflame the jury. Weak and strong cases were not joined. The evidence against Mr. Frazier was strong as to each count. The victims all repeatedly and positively identified him as the perpetrator. None of the charges was a capital offense and joinder did not convert the matter into a capital case. (*People v. McKinnon, supra,* 52 Cal.4th at p. 630; *People v. Hartsch, supra,* 49 Cal.4th at p. 493.) Here too, we need not separately discuss the federal constitutional gloss defendant asserts for the first time on appeal. (*People v. Lynch, supra,* 50 Cal.4th at p. 735, fn. 14; *People v. Loker, supra,* 44 Cal.4th at p. 704, fn. 7.)

B. Sufficiency Of The Evidence

1. Committed for the benefit of a criminal street gang

Defendants argue there was no substantial evidence the offenses, particularly the robbery homicide and grand theft person incidents were committed for the benefit of, at the direction of, or in association with a street gang. They further contend it was error to allow Detective John Flores to testify in response to hypothetical questions that mirrored the evidence at trial. Here, as in *People v. Jones* (2009) 47 Cal.4th 566, 571, footnote 2, "For the sake of simplicity, we use the shorthand phrase 'to benefit a criminal street gang' to refer to crimes that, in the statutory language, are committed 'for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members.' (§ 186.22, subd. (b).)" (See *People v. Sok* (2010) 181 Cal.App.4th 88, 92, fn. 3.)

Our Supreme Court has held: "In considering a challenge to the sufficiency of the evidence to support an enhancement, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Wilson* (2008) 44 Cal.4th 758, 806.) We presume every fact in support of the judgment the trial of fact could have reasonably deduced from the evidence. (*Ibid.*) If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.) 'A reviewing court neither reweighs evidence nor reevaluates a witness's credibility.' (*Ibid.*)" (*People v. Albillar* (2010) 51 Cal.4th 47, 59-60; accord, *People v. Powell* (2011) 194 Cal.App.4th 1268, 1287.) With respect to the "to benefit a criminal street gang" element of the gang enhancement, our Supreme Court has explained: "[T]he Legislature included the requirement that the crime to be enhanced be committed for the benefit of, at the direction of, or in association with a criminal street gang to make it 'clear that a criminal offense is subject to increased punishment under the [Street Terrorism Enforcement and Prevention (STEP)] Act only if the crime is "gang related."' (*People v. Gardeley* (1996) 14 Cal.4th 605, 622.) Not every crime committed by gang members is related to a gang." (*People v. Albillar, supra,* 51 Cal.4th at pp. 59-60; accord, *People v. Galvez* (2011) 195 Cal.App.4th 1253, 1260.)

There was substantial evidence defendants were active, documented gang members. Further the crimes were committed in gang territory. Defendants do not dispute that evidence. And the parties stipulated that defendants' gang was a criminal street gang as defined in section 186.22, subdivision (f). There also was substantial evidence defendants perpetrated the offenses with fellow gang members. Further, the prosecution could properly present opinion testimony to the effect that the crimes were committed to benefit the gang. (*People v. Gutierrez* (2009) 45 Cal.4th 789, 820; *People v. Hernandez* (2004) 33 Cal.4th 1040, 1047-1048; *People v. Gardeley, supra*, 14 Cal.4th

at pp. 617-620.) Detective Flores testified: gang members commit violent acts to gain respect for themselves; the acts are also committed to benefit the gang; the crimes elevate their individual status in the gang and raise the level of fear in the community; and this in turn makes it easier for gang members to commit crimes. Detective Flores was presented with hypothetical questions closely tracking the facts of the present offenses. The prosecutor asked whether in Detective Flores's opinion the crimes as described would be gang-related. Detective Flores testified the grand theft person offense was committed for the benefit of the gang. Detective Flores reasoned: it was committed in broad daylight in territory claimed by an allied gang; it served to generate fear in the community to both gangs' benefit; members of defendants' gang needed to show they were committing crimes for their gang and for the alliance; any profits would benefit both the individuals and the gang community; gang members commonly loiter in locations potential victims may frequent, such as the Arco gas station; the crime was preplanned; one perpetrator had the gang nickname of the other tattooed on his arm, showing they were "crimees"—good friends who commit a lot of crimes together; and the perpetrators demonstrated they had the ability to commit violent crime.

Also in response to hypothetical questions, Detective Flores testified that the video game store robbery and murder were committed to benefit the gang because: the offense occurred in an area that was a gang stronghold; gang members were teaching other members to commit crime; two of the gang members had committed crimes together in the past; they solicited the help of a third gang member—someone they could trust; the crime was preplanned; the crime helped to maintain the gang's reputation for violence, creating intimidation and making it easier to commit other offenses; it provided monetary benefit to the gang; gangs need money to, in particular, procure weapons; and the crime elevated the perpetrators' gang status and created respect for the gang and the individuals, making rival members fearful. This testimony in response to hypothetical inquiries provided a proper basis from which the jury could reasonably conclude the crimes charged were committed "for the benefit of, at the direction of, or in association with" defendants' gang. (*People v. Vang* (2011) 52 Cal.4th 1038, 1044-1052; *People v.*

Gardeley, supra, 14 Cal.4th at p. 619.) The foregoing was substantial evidence the crimes charged were committed to benefit defendants' gang. (*People v. Albillar, supra,* 51 Cal.4th at p. 63; *People v. Gardeley, supra,* 14 Cal.4th at p. 619; *People v. Mendez* (2010) 188 Cal.App.4th 47, 56-58.)

2. Accomplice testimony corroboration

Mr. Alvarez contends Mr. Bingley was an accomplice whose testimony required corroboration. It is well settled that accomplice testimony must be corroborated. (§ 1111; *People v. Gonzales and Soliz, supra,* 52 Cal.4th at pp. 303-304; *People v. Guiuan* (1998) 18 Cal.4th 558, 570.) However, as our Supreme Court explained in *Gonzales*: "'Corroborating evidence may be slight, may be entirely circumstantial, and need not be sufficient to establish every element of the charged offense.' (*People v. Hayes* (1999) 21 Cal.4th 1211, 1271.) The evidence is 'sufficient if it tends to connect the defendant with the crime in such a way as to satisfy the jury that the accomplice is telling the truth.' (*People v. Fauber* (1992) 2 Cal.4th 792, 834.)" (*People v. Gonzales and Soliz, supra,* 52 Cal.4th at p. 303.) Similarly, in *People v. Nelson* (2011) 51 Cal.4th 198, 218, our Supreme Court observed: "The corroborating evidence may be slight and entitled to little consideration when standing alone. However, it must tend to implicate the defendant by relating to an act that is an element of the crime. It need not by itself establish every element, but must, without aid from the accomplice's testimony, tend to connect the defendant with the offense. The trier of fact's determination on the issue of corroboration is binding on review unless the corroborating evidence should not have been admitted or does not reasonably tend to connect the defendant with the commission of the crime. (*People v. Abilez* (2007) 41 Cal.4th 472, 505; [*People v.*] *McDermott* [(2002)] 28 Cal.4th [946,] 986.)"

There was sufficient evidence in the present case connecting Mr. Alvarez with the robbery and murder at the video game store. Mr. Alvarez and Mr. Frazier were members of the same gang. Mr. Frazier's gang moniker was tattooed on Mr. Alvarez's arm,

evidence the two were closely allied. Mr. Alvarez and Mr. Frazier, who was clearly identified as a perpetrator of the video game store crimes, had recently jointly committed grand theft against Ms. Caldwell. During the commission of that grand theft, Mr. Alvarez drove a black Dodge Intrepid. Mr. Bingley testified Mr. Alvarez drove a black Dodge Intrepid to the video game store. Mr. Frazier was later detained from a black Dodge Intrepid driven by Mr. Alvarez. And police later recovered a black Dodge Intrepid at Mr. Alvarez's home. A surveillance camera near the video game store showed one of the three perpetrators of the robbery and murder walked with a pronounced limp. Mr. Alvarez had a pronounced limp. The trial court observed that the video-taped image of the person with a pronounced limp matched Mr. Alvarez's general appearance. And video games that could have been stolen in the robbery were found in Mr. Alvarez's residence. That a copy of one game was also found tended to suggest duplication for purposes of sale. The foregoing evidence reasonably tended to connect Mr. Alvarez with the crimes committed at the video game store such that the jury could conclude Mr. Bingley told the truth.

3. The robbery-murder special circumstance finding

Mr. Alvarez challenges the felony-murder special circumstance finding on grounds there was no substantial evidence he aided and abetted the robbery as a major participant *with reckless indifference for human life*. (§ 190.2, subd. (d); see *People v. Thompson* (2010) 49 Cal.4th 79, 125-126; *People v. Estrada* (1995) 11 Cal.4th 568, 571-572, 575.) Mr. Alvarez reasons he had left the store during the robbery. Only then did Mr. Bishara walk in. Further, Mr. Alvarez asserts there was no reason to believe Mr. Frazier intended to use the handgun other than to restrain the employees and rob the store.

Our Supreme Court has held: "[T]he culpable mental state of 'reckless indifference to life' is one in which the defendant 'knowingly engage[es] in criminal activities known to carry a grave risk of death' ([*Tison v. Arizona* (1987)] 481 U.S. [137,]

157) . . . ." (*People v. Estrada, supra,* 11 Cal.4th at p. 577; accord, *People v. Mil* (2012) 53 Cal.4th 400, 417.) Further, "This mental state thus requires the defendant be '*subjectively* aware that his or her participation in the felony involved a grave risk of death.' ([*People v. Estrada, supra,* 11 Cal.4th at p. 577.)]" (*People v Mil, supra,* 53 Cal.4th at p. 417.) Here, Mr. Alvarez participated in the robbery with knowledge Mr. Frazier was armed and actively employing the firearm to subdue and restrain the employees. Mr. Alvarez was in the store when Mr. Frazier wielded the gun. Mr. Alvarez and Mr. Bingley duct-taped the two employees while Mr. Frazier pointed the gun at them. The use of a weapon to effect the robbery presented a grave risk of death. This was substantial evidence Mr. Alvarez knowingly engaged in criminal activity involving a grave risk of death. (*People v. Mil, supra,* 53 Cal.4th at p. 417; *People v. Lopez* (2011) 198 Cal.App.4th 1106, 1115-1116; *People v. Bustos* (1994) 23 Cal.App.4th 1747, 1751, 1754-1755.)

C. Evidence Admitted Or Excluded

1. Third party culpability evidence

Defendants assert it was prejudicial error to exclude evidence from which the jury could have found a third party, Kenneth Chatman, was one of the video game store robbers. We disagree. The trial court did not abuse its discretion in ruling the proffered evidence did not either directly or circumstantially connect Mr. Chatman to the actual perpetration of the robbery homicide. (See *People v. McWhorter* (2009) 47 Cal.4th 318, 372-373 ["We conclude the record supports the trial court's ruling"]; *People v. Avila* (2006) 38 Cal.4th 491, 578 ["We review for abuse of discretion a trial court's rulings on relevance and exclusion of evidence under Evidence Code section 352"].)

In *People v. Hall* (1986) 41 Cal.3d 826, 833, our Supreme Court held: "To be admissible, . . . third-party [culpability] evidence need not show 'substantial proof of probability' that the third person committed the act; it need only be capable of raising a

reasonable doubt of defendant's guilt. At the same time, we do not require that any evidence, however remote, must be admitted to show a third party's possible culpability. . . . [E]vidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime." (Accord, *People v. Vines* (2011) 51 Cal.4th 830, 860; *People v. McWhorter, supra*, 47 Cal.4th at pp. 367-368.) Further, third party culpability evidence is treated like any other evidence; it is admissible if relevant (Evid. Code, § 350) unless it is excludable pursuant to Evidence Code section 352. (*People v. McWhorter, supra*, 47 Cal.4th at pp. 367-368, 372-373; *People v. Hall, supra*, 41 Cal.3d at p. 834.) In *McWhorter*, our Supreme Court reiterated: "'[T]o be admissible, evidence of the culpability of a third party offered by a defendant to demonstrate that a reasonable doubt exists concerning his or her guilt, must link the third person either directly or circumstantially to the actual perpetration of the crime. In assessing an offer of proof related to such evidence, the court must decide whether the evidence could raise a reasonable doubt as to [the] defendant's guilt and whether it is substantially more prejudicial than probative under Evidence Code section 352. [Citations.]'" (*People v. McWhorter, supra*, 47 Cal.4th at pp. 367-368; see *People v. Lynch, supra*, 50 Cal.4th at p. 756.)

Defense counsel made an offer of proof as follows. First, Boris Garcia would testify that on September 3, 2004—the day of the robbery homicide at the video game store—Mr. Chatman, a gang member, walked into the tattoo parlor. The tattoo parlor was next door to the video game store. Mr. Chatman was carrying a paintball gun. During a conversation, Mr. Chatman said he could rob somebody with it. Second, Detective Lait would testify as to a conversation with Mr. Chatman. According to Mr. Chatman, he was solicited to rob the video game store. The offer was made by Mr. Harris, a fellow gang member. Mr. Harris and Mr. Chatman then cased the store. But in the conversation with Detective Lait, Mr. Chatman denied participating in any robbery. Third, Mr. Harris would testify to having asked Mr. Chatman to case the video

game store. According to Mr. Harris, they were going to case the video game store together. Mr. Harris admitted giving Mr. Chatman a roll of duct tape to hold while they did so. Fourth, one month after the robbery, Mr. Secord identified Mr. Chatman in a photographic lineup as someone who had been around the strip mall the day of the robbery. According to Mr. Secord, Mr. Chatman was wearing a hard plastic face mask commonly used in paintball competitions.

The prosecution argued there was no evidence Mr. Chatman was involved in the robbery homicide. According to the prosecutor: Mr. Secord was familiar with Mr. Chatman; Mr. Secord had seen Mr. Chatman wearing a mask earlier on the day of the robbery; Mr. Secord did not identify Mr. Chatman as one of the robbers; and Mr. Secord said the mask worn by one of the perpetrators was *not* the one Mr. Chatman had been wearing earlier. Finally, the prosecutor argued Mr. Bingley also did not identify Mr. Chatman as one of the perpetrators.

The trial court tentatively ruled the proffered evidence did not raise a reasonable doubt as to defendants' guilt. The court noted: there was no suggestion the robbery contemplated by Mr. Chatman and Mr. Harris ever occurred; the robbery that did occur was not committed by any individual wearing a paintball mask; no perpetrator of the robbery homicide wielded a paintball gun; the accomplice, Mr. Bingley, never named either Mr. Harris or Mr. Chatman as a perpetrator of the robbery; and Mr. Secord did not identify Mr. Chatman as one of the robbers.

Prior to issuing a final ruling, the trial court allowed the defense to call Mr. Chatman, Mr. Harris and Ms. Harmon to testify under Evidence Code section 402. Mr. Chatman asserted his Fifth Amendment right and refused to testify. The trial court observed that Mr. Chatman's entire face was covered with tattoos; moreover, the tattoos predated the robbery. Mr. Harris denied knowing Mr. Chatman or Ms. Harmon. Mr. Harris also denied having cased the video game store with Mr. Chatman. Ms. Harmon denied telling the detectives that Mr. Harris had come to her house saying he planned to rob the video game store.

With respect to Mr. Chatman, the trial court ruled: "There is zero possibility . . . that in reality Mr. Chatman was involved in that robbery. I say that because he is so distinctive that there is no reasonable possibility that anybody would misidentify anybody in this case for him. [¶] That being the case, his alleged involvement is . . . not capable of raising a reasonable doubt . . . ." The trial court concluded the marginal relevance of the testimony as to Mr. Chatman was outweighed by the undue consumption of time required to present the evidence: "There will be no reference whatever to Mr. Chatman for reasons I've stated. Under [Evidence Code section] 352, the time consumed would include then trotting Mr. Chatman into the courtroom and dealing with that whole issue to disprove any allegation that, in fact, he really was involved."

As noted above, evidence was offered at trial that Mr. Harris and an unidentified accomplice (not either of defendants) had, prior to the robbery homicide, while carrying duct tape, cased the video game store. There was also evidence that prior to the robbery homicide, Mr. Harris had paid a visit to Ms. Harmon, who lived near the store. Mr. Harris told Ms. Harmon he planned to rob the store and asked her for bags, rope and gloves. Mr. Harris returned several days later, after the robbery and murder had occurred. When questioned by Ms. Harmon, Mr. Harris denied robbing the store. At trial, Ms. Harmon said she had no recollection of talking to Detective Lait. Also at trial, Mr. Harris denied he had been at Ms. Harmon's house and telling investigators he had cased the video game store. Also at trial, Mr. Secord identified a photograph of Mr. Chatman as someone who was "around the neighborhood," in front of the strip mall. Further, Mr. Secord testified Mr. Chatman was next door at the tattoo parlor "almost on a daily" basis. Mr. Secord never identified Mr. Chatman as a participant in the robbery.

The trial court did not err prejudicially when it excluded evidence pertaining to Mr. Chatman. Defendants' offer of proof failed to link Mr. Chatman to the actual robbery homicide. There was no evidence any perpetrator wielded a paintball gun. There was no testimony a perpetrator of the robbery homicide wore a paintball mask of the type Mr. Chatman had been seen wearing. Mr. Secord was familiar with

Mr. Chatman. Mr. Secord did not identify Mr. Chatman as a participant in or possible perpetrator of the robbery homicide. The accomplice, Mr. Bingley, never named Mr. Chatman as one of the robbers. No witness described a person with tattoos covering his face as having been involved. That Mr. Chatman considered robbing the video game store at or about the same time the present robbery occurred was not evidence linking him to the actual perpetration of the crime. That Mr. Chatman and defendants were fellow gang members changes nothing in the context of abuse of discretion review on our part. There was no evidence Mr. Chatman and Mr. Harris ever robbed the video game store. The trial court could reasonably conclude, given the testimony's marginal relevance, that presenting it—including calling Mr. Garcia and Mr. Chatman to testify—would require an undue consumption of time.

2. The note

Over defense objection, the trial court admitted evidence Mr. Bingley, while incarcerated, had been given a handwritten note. The note threatened to harm Mr. Bingley or his family members if he testified in the present case. There was also evidence the note might have been written by an inmate with pro. per. privileges, a status Mr. Frazier had enjoyed. Defendants assert it was prejudicial error to allow the evidence absent testimony either defendant authorized the note. A trial court exercises broad discretion in the admission or exclusion of evidence. (*People v. Scott* (2011) 52 Cal.4th 452, 490; *People v. Richardson* (2008) 43 Cal.4th 959, 1000-1001.) Here, the trial court could properly rule Mr. Bingley's testimony was suspect because he gave it in return for leniency. And the trial court could reasonably find evidence of the threat against Mr. Bingley bore on his credibility even if the threat was not linked to defendants. (*People v. Mendoza* (2011) 52 Cal.4th 1056, 1084; *People v. Green* (1980) 27 Cal.3d 1, 20, disapproved on other points in *People v. Martinez* (1999) 20 Cal.4th 225, 233-237, and *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3; see *People v. Guerra* (2006) 37 Cal.4th 1067, 1142.) There was no abuse of discretion.

3. The in-person lineup identification

The video game store robbery occurred on September 3, 2004. On October 1, 2004, Mr. Secord, the store employee, identified Mr. Frazier in a photographic lineup. Mr. Secord noted: "Could be. Not sure. Strong possibility." Mr. Frazier was arrested on December 7, 2004, in connection with the robberies of Mr. Coleman and Mr. Severe. The trial court subsequently ordered Mr. Frazier, who was in custody, to participate in an in-person lineup. At the April 21, 2005 in-person lineup, Mr. Secord positively identified Mr. Frazier as a perpetrator of the robbery homicide at the video game store. Mr. Secord was 100 percent certain of his identifications. Mr. Secord hesitated only because Mr. Frazier's face appeared to have a birthmark. Mr. Secord did not see the apparent birthmark at the time of the robbery. Evidence was subsequently introduced that the mark was the result of an abrasion Mr. Frazier suffered at the time of his arrest.

Mr. Frazier moved to suppress Mr. Secord's in-person lineup identification. Mr. Frazier argued the trial court lacked authority to order him to participate in the lineup. On appeal, Mr. Frazier argues it was error to deny the motion to suppress the in-person lineup identification. Mr. Frazier relies on *Goodwin v. Superior Court* (2001) 90 Cal.App.4th 215, 221-226. In *Goodwin*, we held the respondent court had no jurisdiction to ex parte order a suspect who was *out of custody* and charged with no crimes to appear at a lineup. (*Id.* at pp. 221-226.) *Goodwin* is inapposite. Mr. Frazier was *in custody* and charged with crimes when the in-person lineup occurred. And there was reasonable cause to believe Mr. Frazier had participated in the video game store robbery homicide. Mr. Secord had made a photographic lineup identification of Mr. Frazier. (*People v. Sequeira* (1981) 126 Cal.App.3d 1, 13.) Further, Mr. Frazier had no constitutional due process or self-incrimination right to refrain from participating in the lineup. (*United States v. Wade* (1967) 388 U.S. 218, 222-223; *People v. Johnson* (1992) 3 Cal.4th 1183, 1220-1222; *Goodwin v. Superior Court*, *supra*, 90 Cal.App.4th at p. 220.) The trial court did not err in denying Mr. Frazier's motion to suppress Mr. Secord's identification at the live lineup.

D. Prosecutorial Misconduct

Defendants argue the prosecutor made comments in closing argument about Dr. Shomer that amounted to prejudicial misconduct. The prosecutor argued: "Remember that character . . . Dr. Shomer who got on the stand? We paid him over a million dollars over—well, $800,000 over the past ten years to get on the stand and say some of the stuff that he said." And in reference to the defense attorneys' upcoming arguments, the prosecutor said, "I anticipate they are going to talk a little bit about their star witness that we paid way too much money for, Mr. Shomer—Dr. Shomer."

Defendants forfeited this contention by failing to object on any ground. Any conceivable harm caused by the prosecutor's statements could have been cured by an admonition. (*People v. Redd* (2010) 48 Cal.4th 691, 753; *People v. Farnam, supra,* 28 Cal.4th at p. 167; *People v. Earp* (1999) 20 Cal.4th 826, 862.) In any event, we find no prejudicial misconduct. Our Supreme Court has held: "The prosecutor is permitted to urge, in colorful terms, that defense witnesses are not entitled to credence, to comment on failure to produce logical evidence [and] to argue on the basis of inference from the evidence that a defense is fabricated . . . ." (*People v. Pinholster* (1992) 1 Cal.4th 865, 948, disapproved on another point in *People v. Williams* (2010) 49 Cal.4th 405, 459; accord, *People v. Earp, supra,* 20 Cal.4th at p. 863; *People v. Dennis* (1998) 17 Cal.4th 468, 522.) And, as explained in *People v. Arias* (1996) 13 Cal.4th 92, 162: "Argument may not denigrate the integrity of opposing *counsel,* but harsh and colorful attacks on the credibility of opposing *witnesses* are permissible. (*People v. Sandoval* (1992) 4 Cal.4th 155, 180, 184; *People v. Cummings* [1993)] 4 Cal.4th 1223, 1302.) Thus counsel is free to remind the jurors that a paid witness may accordingly be biased and is also allowed to argue, from the evidence, that a witness's testimony is unbelievable, unsound, or even a patent 'lie.' ([*People v.*] *Sandoval, supra,* [4 Cal.4th] at p. 180; see *People v. Price* [(1991)] 1 Cal.4th 324, 457.)"

The present argument was permissible. The prosecutor merely asserted Dr. Shomer's purported science-based opinions about eyewitness identifications could not be

trusted as they were espoused for financial gain. (*People v. Redd, supra,* 48 Cal.4th at p. 753 [prosecutor commented on expert witness's fee]; *People v. Arias, supra,* 13 Cal.4th at pp. 161-162 [prosecutor argued that in comparison to defense expert witness, eyewitness "'wasn't paid a hundred dollars for his testimony'"]; *People v. Spector* (2011) 194 Cal.App.4th 1335, 1406 [prosecutor accused defense of throwing money at experts in attempt to get client acquitted].)

E. Ineffective Assistance Of Counsel

Detective Craig Dean interviewed Mr. Frazier. The interview was conducted prior to Mr. Frazier's arrest. The jurors heard a tape recording and received transcripts of that interview. Several comments were made in the course of that interview about Mr. Frazier's past criminal history. Mr. Frazier stated: "I'd done been in jail too long to let any nigger punk me"; "I did my jail time"; and "I'm not on parole no more, nothing." The following exchange also occurred: "Detective Dean: . . . I'm just letting you know for future reference, you know, because of your past arrests -- [¶] Terrell Frazier: Uh-huh." After the tape recording was presented to the jury, Mr. Frazier's counsel, Edward Murphy, objected and requested an admonition. The trial court ruled the objection came too late. Mr. Frazier now argues Mr. Murphy was ineffective for failure to act in a timely manner.

We need not decide whether Mr. Murphy's performance was deficient because Mr. Frazier has failed to establish, as a demonstrable reality, there is a reasonable probability of a different result. (*Strickland v. Washington* (1984) 466 U.S. 668, 697; *People v. Lawley* (2002) 27 Cal.4th 102, 136; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1241.) The case against Mr. Frazier was compelling. Mr. Frazier's victims positively identified him. Mr. Bingley, whose testimony as an accomplice was adequately corroborated, placed Mr. Frazier at the scene of the video game store robbery. And Mr. Bingley identified Mr. Frazier as the person who fired the fatal shot. The brief nonspecific references to Mr. Frazier's prior criminality were never again mentioned in

front of the jury. It is not reasonably probable the outcome would have been more favorable to Mr. Frazier had Mr. Murphy moved to redact the remarks or requested an admonition.

F. Jury Instruction

1. Robbery-murder special circumstance: CALJIC No. 8.81.17

The jury was instructed: "To find that the special circumstance referred to in these instructions as murder in the commission of robbery is true, it must be proved: [¶] 1a. The murder was committed while a defendant was engaged in or was an accomplice in the commission or attempted commission of a robbery; or [¶] 1b. The murder was committed during the immediate flight after the commission or attempted commission of a robbery by the defendant to which the defendant was an accomplice." [*Sic.*] (CALJIC No. 8.81.17.) The following language was omitted, without objection: "2. The murder was committed in order to carry out or advance the commission of the crime of [robbery] or to facilitate the escape therefrom or to avoid detection. In other words, the special circumstance referred to in these instructions is not established if the [robbery] was merely incidental to the commission of the murder." (CALJIC No. 8.81.17.)

Defendants assert it was prejudicial error to omit the language in paragraph 2. They reason there was a factual issue whether the robbery was incidental to the murder. They contend the omitted language concerned a necessary element of the special circumstance allegation and the failure to include it violated their constitutional rights. Having failed to request that the omitted language be included, defendants have forfeited this argument. (*People v. Valdez* (2004) 32 Cal.4th 73, 113; *People v. Hart* (1999) 20 Cal.4th 546, 622.) In any event, there was no evidence of a robbery in the commission of a murder. Hence, there was no error in omitting the second paragraph and no violation of defendants' constitutional rights. (*People v. Taylor* (2010) 48 Cal.4th 574, 628-629; *People v. Valdez, supra,* 32 Cal.4th at pp. 113-114.)

2. Witness willfully false instruction—CALJIC No. 2.21.2

The jury was, without objection, instructed: "A witness, who is willfully false in one material part of his or her testimony, is to be distrusted in others. You may reject the whole testimony of a witness who willfully has testified falsely as to a material point, unless, from all the evidence, you believe the probability of truth favors his or her testimony in other particulars." Defendants contend this instruction, which allowed the jury to resolve credibility questions as to impeached prosecution witnesses, violated their due process rights. They argue this instruction, which permitted use of the preponderance of evidence standard of proof, improperly reduced the prosecution's burden of proof. Our Supreme Court has repeatedly rejected this argument. (*People v. Nakahara* (2003) 30 Cal.4th 705, 714; *People v. Maury* (2003) 30 Cal.4th 342, 428-429; *People v. Hillhouse* (2002) 27 Cal.4th 469, 493; *People v. Riel* (2000) 22 Cal.4th 1153, 1200; see *People v. Beardslee* (1991) 53 Cal.3d 68, 94-95.) We are bound by those decisions. (*People v. Bonnetta* (2009) 46 Cal.4th 143, 156; *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Further, here as in *Riel*, "The instructions as a whole correctly instructed the jury on the prosecution's burden of proof." (*People v. Riel, supra,* 22 Cal.4th at p. 1200, citing *People v. Brown* (1996) 42 Cal.App.4th 1493, 1502-1503.)

3. "In association with any criminal street gang"

Defendants argue the trial court had a sua sponte duty to give an additional instruction as to what the phrase "in association with a criminal street gang" means. Defendants argue the jury should have been instructed they must have "relied on . . . common gang membership and the apparatus of the gang" when committing the charged crimes. Without this additional instruction concerning common membership and the use of a gang apparatus, they argue the special allegation cannot be sustained.

Defendants rely on *People v. Albillar, supra,* 51 Cal.4th at page 60. This argument misconstrues *Albillar.* Our Supreme Court was not there giving a technical, legal meaning to the statutory language. Nor have defendants shown that the statutory language, "committed for the benefit of, at the direction of, or in association with any criminal street gang" (§ 186.22, subd. (b)) has a definition that differs from its nonlegal meaning. (*People v. Estrada, supra,* 11 Cal.4th at pp. 574-575; *People v. Poggi* (1988) 45 Cal.3d 306, 327; see *People v. Albillar, supra,* 51 Cal.4th at p. 70 & fn. 2 (dis. & conc. opn. of Werdegar, J.).) As our Supreme Court explained in *People v. Jennings* (2010) 50 Cal.4th 616, 670, "'When a word or phrase "'is commonly understood by those familiar with the English language and is not used in a technical sense peculiar to the law, the court is not required to give an instruction as to its meaning in the absence of a request.'" [Citations.]' (*People v. Estrada*[, *supra,*] 11 Cal.4th [at p.] 574.)" Therefore, having failed to request a clarifying instruction, defendants forfeited their objection. (*People v. Russell* (2010) 50 Cal.4th 1228, 1273; *People v. Jennings, supra,* 50 Cal.4th at p. 671.) Even if the argument were preserved, we would not find any prejudice. (*People v. Gamache* (2010) 48 Cal.4th 347, 376; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 101.) Detective Flores explained at length what it meant to commit a crime for the benefit of a gang.

G. The Felony-Murder Special Circumstance Rule

Defendants argue the felony-murder special circumstance does not adequately narrow the class of persons subject to life without the possibility of parole. Our Supreme Court has repeatedly rejected such challenges. (*People v. Pollock* (2004) 32 Cal.4th 1153, 1195-1196; *People v. Gurule* (2002) 28 Cal.4th 557, 663; *People v. Kraft* (2000) 23 Cal.4th 978, 1078; *People v. Frye* (1998) 18 Cal.4th 894, 1028-1029, disapproved on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1265.) We are bound by those decisions. (*People*

v. Bonnetta, supra, 46 Cal.4th at p. 156; *Auto Equity Sales, Inc. v. Superior Court, supra*, 57 Cal.2d at p. 455.)

H. Cumulative Error

Defendants argue the cumulative effect of errors committed by the trial court requires the reversal of their convictions. We disagree. There has been no showing of prejudicial cumulative error. (*People v. Dement* (2011) 53 Cal.4th 1, 58; *People v. Mendoza* (2011) 52 Cal.4th 1056, 1099.)

I. Sentencing Error

1. Error in sentencing defendant appearing without counsel

At the time of sentencing, Mr. Frazier's attorney, Mr. Murphy, was engaged in trial elsewhere. Mr. Frazier expressly agreed Mr. Alvarez's counsel would represent both defendants. The trial court inquired: "[G]entlemen, you each have the right to separate counsel at all stages of the proceedings. [¶] Is it agreeable with you, Mr. Frazier and Mr. Alvarez, that Mr. [Albert] DeBlanc handle the sentencing for both of you in the absence of Mr. Murphy?" Defendant answered: "Yes. As of now, yes." It was agreed, however, that Mr. Frazier could address the court. Mr. Frazier, "addressing the court for appellate purposes," discussed trial error. The matter then proceeded to sentencing. On appeal, Mr. Frazier asserts the trial court denied his continuance request and his "attempt at" a *Marsde*n hearing. (*People v. Martinez* (2009) 47 Cal.4th 399, 418; *People v. Marsden* (1970) 2 Cal.3d 118, 126.) Mr. Frazier did not request a continuance. He did not show any good cause for a continuance. As a result, his claim has no merit. (See § 1050; *People v. Riggs* (2008) 44 Cal.4th 248, 296; *People v. Roldan* (2005) 35 Cal.4th 646, 670, disapproved on another point in *People v. Doolin, supra,* 45 Cal.4th at p. 421, fn. 22.) Mr. Frazier also did not request a hearing be held on the issue of substitution of

counsel. He did not request substitution of counsel. As a result, no duty to conduct a hearing on a substitution of counsel request was triggered. (*People v. Martinez, supra,* 47 Cal.4th at p. 418; *People v. Dickey* (2005) 35 Cal.4th 884, 920.)

2. Local crime prevention programs fine

As to each defendant, the trial court properly imposed a $10 local crime prevention programs fine (§ 1202.5, subd. (a)) "plus surcharges and assessments." The use of the terms "surcharges and assessments" reflects the trial court's intent that the mandatory penalties and surcharge be added to the local crime prevention programs fine. (*People v. Voit* (2011) 200 Cal.App.4th 1353, 1372-1373; *People v. Sharret* (2011) 191 Cal.App.4th 859, 864.) The local crime prevention programs fine was potentially subject to a total of $26 in penalties and a surcharge, specifically: a $10 section 1464, subdivision (a)(1) state penalty; a $7 Government Code section 76000, subdivision (a)(1) county penalty; a $2 section 1465.7, subdivision (a) state surcharge; a $2 Government Code section 76000.5, subdivision (a)(1) emergency medical services penalty; a $3 Government Code section 70372, subdivision (a)(1) state court construction penalty; a $1 Government Code section 76104.6, subdivision (a)(1) deoxyribonucleic acid penalty; and a $1 Government Code section 76104.7, subdivision (a) state-only deoxyribonucleic acid penalty. (*People v. Voit, supra,* 200 Cal.App.4th at pp. 1373-1374; *People v. Castellanos* (2009) 175 Cal.App.4th 1524, 1528-1530.) Here, however, both the $2 Government Code section 76000.5, subdivision (a)(1) emergency medical services penalty and the $1 Government Code section 76104.7, subdivision (a) state-only deoxyribonucleic acid penalty took effect after defendants committed the present offenses, in 2004. Government Code section 76000.5 took effect on January 1, 2007 (Stats. 2006, ch. 841, § 1). Government Code section 76104.7 was effective on July 12, 2006. (Stats. 2006, ch. 69, § 18.) Ex post facto principles prohibit imposition of those penalties in this case. (*People v. Voit, supra,* 200 Cal.App.4th at p. 1374; cf. *People v. Batman* (2008) 159 Cal.App.4th 587, 591 [Gov. Code, § 76014.6]; see also *People v. High* (2004) 119

Cal.App.4th 1192, 1197-1199 [§ 1465.7; Gov. Code, § 70372].) Therefore, the $10 local crime prevention programs fine was subject to penalties and a surcharge totaling $23 rather than $26. The abstracts of judgment must be corrected to reflect a $10 section 1202.5, subdivision (a) fine as to each defendant plus $23 in penalties and a surcharge for a total amount of $33.

3. Presentence custody credits

The trial court awarded Mr. Frazier credit for his presentence custody from the date he was arrested, December 7, 2004, to September 20, 2010, when he was sentenced, a period of 2,114 days. The abstract of judgment erroneously reflects a credit of only 2,112 days. The abstract of judgment must be corrected to reflect 2,114 of presentence custody credit.

The trial court awarded Mr. Alvarez credit for his presentence custody from the date he was arrested, May 14, 2007, to the day he was sentenced, September 20, 2010, a period of 1,226 days. The abstract of judgment erroneously reflects a credit of only 1,225 days. The abstract of judgment must be corrected to reflect 1,226 days of presentence custody credit.

4. Abstract of judgment

Mr. Alvarez correctly contends the abstract of judgment must be corrected insofar as it erroneously reflects a concurrent 25 years-to-life sentence under section 12022.53, subdivisions (d) and (e)(1) as to count 5, grand theft person. The abstract of judgment must be amended to delete that reference.

IV. DISPOSITION

The local crime prevention programs fines are modified as discussed in part III, section I.2. The judgment is affirmed in all other respects. Upon remittitur issuance, the abstracts of judgment must be amended to reflect: the corrected presentence custody credit; local crime prevention programs fines (Pen. Code, § 1202.5, subd.(a)) plus penalties and a surcharge totaling $33; and, as to Mr. Alvarez, to delete the concurrent 25-year-to-life sentence under Penal Code section 12022.53, subdivisions (d) and (e)(1) as to count 5. The clerk of the superior court shall deliver a copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P. J.

We concur:

ARMSTRONG, J.

KRIEGLER, J.